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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

The FALLON PAIUTE-SHOSHONE TRIBE
and the CENTER FOR BIOLOGICAL
DIVERSITY,

Plaintiffs,

vs.

U.S. DEPARTMENT OF THE INTERIOR,
BUREAU OF LAND MANAGEMENT, and
JAKE VIALPANDO in his official capacity
as Field Manager of the Bureau of Land
Management Stillwater Field Office, and
ORMAT NEVADA, INC.,

Defendants.

Case No: 3:21-cv-00512-RCJ-CSD

**JOINT STIPULATION AMENDING
SCHEDULING ORDER**

1 Plaintiffs Fallon Paiute-Shoshone Tribe (“FPST”) and the Center for Biological Diversity
2 (“CBD”), Federal Defendants U.S. Department of the Interior, et al. (“Federal Defendants”), and
3 Defendant Ormat Nevada, Inc. (“Ormat”) (together, the “Parties”) have conferred and hereby
4 jointly submit the following stipulation and amendment to the scheduling order, ECF 62, for the
5 Court’s consideration.

6 Pursuant to the Joint Stipulation on Scheduling Order, the Parties have conferred
7 concerning the completeness of the Administrative Records and the admission of extra-record
8 evidence. Federal Defendants have agreed to provide additional materials for inclusion in the ESA
9 Administrative Record by Thursday, September 8. In light of Federal Defendants’ agreement to
10 provide additional record materials, Plaintiffs do not contest the completeness of the
11 Administrative Records.

12 However, Plaintiffs intend to introduce and rely on extra-record evidence; namely the
13 Declaration of Michelle Gordon. Ms. Gordon is the principal author of the published, peer-
14 reviewed scientific study identifying the Dixie Valley toad as a distinct species. Plaintiffs take the
15 position that reliance on Ms. Gordon’s declaration is appropriate because claims under the ESA
16 are not limited in scope by the APA and thus are not limited to the administrative record compiled
17 by the agency. Federal Defendants oppose the introduction of Ms. Gordon’s declaration. Federal
18 Defendants take the position that Plaintiffs’ ESA claims are record-review claims and that
19 Plaintiffs may not rely on Ms. Gordon’s declaration without an order from this Court admitting
20 the declaration as proper extra-record evidence.

21 The Parties have agreed to resolve this disagreement through a motion to strike, which
22 Federal Defendants and/or Ormat may file concurrently with their responses to Plaintiffs’ motion
23 for summary judgment and opening briefs in support of their cross-motions for summary
24 judgment.

25 Finally, due to Federal Defendants’ production of additional record materials, as well as
26 unforeseen scheduling conflicts affecting the availability of Plaintiffs’ attorneys, the Parties have
27

1 agreed to amend the briefing schedule set out in the scheduling order, ECF 62, to extend all briefing
2 deadlines by 7 days, as follows:

- 3 1. Plaintiffs' opening summary judgment brief will be due on September 16, 2022,
4 and will be limited to 60 pages.
- 5 2. Federal Defendants' and Ormat's combined responses to Plaintiffs' motion for
6 summary judgment and opening briefs in support of their cross-motions for
7 summary judgment will be due on October 14, 2022. Federal Defendants and Ormat
8 shall each file a brief in support of their cross-motions for summary judgment and
9 responding to Plaintiffs' motion for summary judgment. Federal Defendants' brief
10 and Ormat's brief shall each be limited to 45 pages. Federal Defendants and/or
11 Ormat may also file a motion to strike concerning the admission of extra-record
12 evidence concurrently with their combined responses/motions for summary
13 judgment. If filed, the motion(s) to strike shall be limited to 15 pages.
- 14 3. Plaintiffs shall file a combined reply in support of their summary judgment motion
15 and in response to Federal Defendants' and Ormat's cross-motions for summary
16 judgment, which will be due on November 4, 2022. Plaintiffs' brief shall be limited
17 to 60 pages. If a motion to strike is filed, Plaintiffs may respond concurrently with
18 their reply/response. Plaintiffs' response opposing the motion(s) to strike shall be
19 limited to 15 pages.
- 20 4. Federal Defendants' and Ormat's replies in support of their cross-motions for
21 summary judgment will each be due on December 9, 2022, and each will be limited
22 to 45 pages. If a motion to strike is filed, Federal Defendants and/or Ormat may
23 reply concurrently with their reply in support of their cross-motions for summary
24 judgment. Replies in support of a motion to strike shall be limited to 10 pages.
- 25 5. Plaintiffs do not waive any claims under the ESA or RFRA which may not be
26 resolved on summary judgment due to unresolved issues of material fact. Plaintiffs
27 take the position that because the ESA and RFRA each provide their own cause of

1 action, claims under these statutes are not limited in scope by the APA and thus
 2 may not be limited to the administrative record compiled by the agency. Federal
 3 Defendants' take the position that ESA Claims are record-review claims governed
 4 by both the scope and standard of the APA that do not present any unresolved issues
 5 of material fact. Further, Federal Defendants and Ormat take the position that
 6 summary judgment and the briefing schedule set forth above can resolve all claims
 7 in Plaintiffs' First Amended Complaint.¹

8 In light of the Parties' commitment to the expedited briefing schedule outlined herein, and
 9 Ormat's intention to suspend construction until either completion of the Section 7 consultation
 10 process or the end of the year, the Parties respectfully request expedited review by the Court, with
 11 a decision on the merits before the end of 2022.

12
 13
 14 Dated September 8, 2022

Respectfully submitted,

15 /s/ Scott Lake

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25 ¹ Federal Defendants also take the position that because Plaintiffs' APA claims challenge
 26 a final agency action, those claims in this case should be decided primarily based on the
 27 Administrative Record compiled by Federal Defendants. However, should the Court find that the
 introduction of extra-record evidence is appropriate, the Parties do not waive their right to seek
 discovery regarding the RFRA and ESA claims.

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ORDER

IT IS SO ORDERED.

DATED: September 8, 2022.


UNITED STATES MAGISTRATE JUDGE